

2001

Nana G. Penrose v. Christopher Ross : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael W. Wright; Attorneys for Appellee.

Scott N Cunningham; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Nana G. Penrose v. Christopher Ross*, No. 20010943 (Utah Court of Appeals, 2001).
https://digitalcommons.law.byu.edu/byu_ca2/3568

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

Nana G. Penrose, Plaintiff / Appellant,	:	Appellate Case No. 20010943 CA
	:	
v.	:	Priority Classification No. 15
	:	
Christopher Ross, An Individual, Bryant Ross, An Individual (Formerly : identified as DOE 1), DOES 2-5 Inclusive, Whose True Names Are :		
Not Known to Plaintiff,	:	
Defendants/Appellees.	:	

BRIEF OF APPELLANT

**APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH**

Appeal from the Order Granting Defendant Bryant Ross' Motion for Summary Judgment of the THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, Salt Lake Department, the Honorable Judge Leon A. Dever presiding.

Scott N. Cunningham (USB #6084)
Attorney for Appellant
211 East 300 South, Suite 216
Salt Lake City, Utah 84111
(801) 364-1663

Michael W. Wright
Attorney for Appellee
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106
(801) 466-4228

IN THE UTAH COURT OF APPEALS

Nana G. Penrose,

Plaintiff / Appellant,

Appellate Case No. 20010943 CA

V.

Priority Classification No. 15

Christopher Ross, An Individual,

**Bryant Ross, An Individual (Formerly :
identified as DOE 1), DOES 2-5**

**Inclusive, Whose True Names Are
Not Known to Plaintiff,**

Defendants/Appellees.

BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH

Appeal from the Order Granting Defendant Bryant Ross' Motion for Summary Judgment of the THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, Salt Lake Department, the Honorable Judge Leon A. Dever presiding.

Scott N. Cunningham (USB #6084)

Attorney for Appellant

211 East 300 South, Suite 216

Salt Lake City, Utah 84111

(801) 364-1663

Michael W. Wright

Attorney for Appellee

2180 South 1300 East, Suite 600

Salt Lake City, Utah 84106

(801) 466-4228

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED FOR REVIEW & STANDARD OF REVIEW	1
CONTROLLING STATUTES	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
POINT I	
PLAINTIFF’S AMENDED COMPLAINT SHOULD RELATE BACK TO THE DATE OF THE FILING OF THE ORIGINAL COMPLAINT BASED UPON UTAH RULES OF CIVIL PROCEDURE, RULE 15(c)’s “RELATION BACK” DOCTRINE AND THE “IDENTITY OF INTEREST” EXCEPTION RECOGNIZED IN UTAH CASE LAW	8
POINT II	
THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO MAKE ANY FINDINGS OF FACTS WHATSOEVER REGARDING THE “IDENTITY OF INTEREST” EXCEPTION.....	11
CONCLUSION	11
CERTIFICATE OF SERVICE	13
ADDENDA:	
A Plaintiff’s Original Verified Complaint for Negligence and Jury Demand	A
B Summons on Return of Service for Defendant Christopher Ross	B

C	Affidavit of Nana Penrose in Support of Opposition to Motion for Summary Judgment	C
D	Plaintiff's First Amended Verified Complaint for Negligence and Demand for Jury Trial	D
E	First Amended Summons, Return of Service for Defendants Christopher and Bryant Ross	E
F	Defendant Bryant Ross' Motion for Summary Judgment & Memorandum in Support of Motion for Summary Judgment	F
G	Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant Bryant Ross' Motion for Summary Judgment	G
H	Plaintiff's Request for Hearing on Defendant Bryant Ross' Motion for Summary Judgment	H
I	Plaintiff's Memorandum of Points and Authorities in Response to Defendant Bryant Ross' Reply Memorandum In Support of Motion for Summary Judgment	I
J	Minute Entry / Disposition Summary on Defendant Bryant Ross' Motion for Summary Judgment	J
K	Plaintiff's Objection to Proposed Order Granting Defendant Bryant Ross' Motion for summary Judgment	K
L	Order Granting Defendant Bryant Ross' Motion for Summary Judgment	L
M	Utah Rules of Civil Procedure, Rule 15(c)	M

TABLE OF AUTHORITIES
CASES CITED

<u>Doxey-Layton Co. v. Clark</u> , 548 P.2d 902, 906 (Utah 1976)	8,9
<u>Morris v. Farnsworth Motel</u> , 123 Utah 289, 259 P.2d 297 (1953)	2
<u>Mountain States Tel. & Tel. Co. v. Garfield County</u> , 811 P.2d 184 (Utah 1991).....	2
<u>Neiderhauser Bldrs.& Dev. Corp. v. Campbell</u> , 824 P.2d 1193 (Utah Ct. App. 1992)	2
<u>Perry v. Pioneer Wholesale Supply Co.</u> , 681 P.2d 214 (Utah 1984)	9
<u>Russell v. Standard Corp.</u> , 898 P.2d 263 (Utah 1995)	8,9
<u>Springville Citizens for a Better Community v. City of Springville</u> , 979 P.2d 332 (Utah 1999)	
<u>Sulzen v. Williams</u> , 977 P.2d 497.....	9
<u>Wilcox v. Geneva Rock Corp.</u> , 911 P.2d 367, 369 (Utah 1996)	8,9

STATUTORY PROVISIONS

URCP Rule 15(c)	8
-----------------------	---

PRIOR OR RELATED APPEALS

There have been no prior or related appeals.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated Section 78-2a-3(2)(j). This is an appeal from an Order Granting Defendant's Motion for Summary Judgment.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Utah Rules of Civil Procedure, Rule 15 (Amended and Supplemental pleadings)

sets forth in Subsection (c) that

“Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

Normally, however, the rule does not apply to a party added by later amendment. An exceptions exists under Utah Case Law which does cause a relation back in the case of a party added by amendment where an “identity of interest” exists between the original defendant and the added party.

“Identity of interest” is defined in the case law as meaning that notice to the original defendant serves as notice to the added party so it can be assumed that relation back is not prejudicial, and that the real party in interest was sufficiently alerted to the proceedings, or was involved in them unofficially

from an early stage.

Does plaintiff/appellant's First Amended Complaint naming Bryant Ross as a defendant relate back in time to the date of the filing of the original complaint under the "identity of interest" exception recognized under Utah Law ?

On review of a summary judgment motion, the party against whom the judgment has been granted is entitled to have all the facts presented , and all the inferences fairly arising therefrom , considered in a light most favorable to him. *Morris v. Farnsworth Motel*, 123 Utah 289, 259 P.2d 297 (1953), *Mountain States Tel. & Tel. Co. v. Garfield County*, 811 P.2d 184 (Utah 1991).

The appellate court reviews the trial court's conclusions of law for correctness, including its conclusion that there are no material fact issues.

Springville Citizens for a Better Community v. City of Springville, 979 P.2d 332 (Utah 1999), *Neiderhauser Bldrs.& Dev. Corp. v. Campbell*, 824 P.2d 1193 (Utah Ct. App. 1992).

CONTROLLING STATUTES

1. URCP Rule 15(c) - Regarding Amended and Supplemental Proceedings. *Relation back of amendments*. Whenever the claim or defense asserted in the amended

pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

STATEMENT OF THE CASE

b) Nature of the case - This is an appeal from an Order Granting Defendant's Motion for Summary Judgment.

c) Course of Proceedings:

1. This case arises out of an automobile accident involving plaintiff which occurred in Salt Lake City, Utah on November 26, 1996. (Verified Complaint, attached as Addendum A).
2. On the date plaintiff filed her original Verified Complaint herein (hereinafter "original complaint"), November 17, 2001, plaintiff did not know the name of the individual Bryant Ross. (Original Complaint, attached as Addendum A; Affidavit of Nana G. Penrose in Support of Opposition to Motion for Summary Judgment, hereinafter "plaintiff's affidavit", attached as Addendum C). In addition to Christopher Ross, plaintiff sued persons whose true identities were unknown to her under the fictitious names of DOES 1-5, and stated that those persons, along with Christopher Ross were negligently responsible for her injuries and damages. This was done in accordance with Utah Rules of Civil Procedure, Rule 9

(a)(2). (Original Complaint; Addendum A).

3. Plaintiff had never received a copy of the Police Report regarding the accident until defendant's counsel provided it to plaintiff's counsel in January, 2001. (Affidavit of Nana G. Penrose in Support of Opposition to Motion for Summary Judgment, hereinafter "plaintiff's affidavit", Addendum C). Because plaintiff did not know Bryant Ross' name, attempts to obtain a copy of the accident report from the police department by plaintiff's counsel were unsuccessful. (Plaintiff's Affidavit; Addendum C).
4. Plaintiff gave a recorded statement regarding the accident in April, 1997, but never received a copy of that statement. (Plaintiff's Affidavit; Addendum C) Although the person taking the statement apparently mentioned the name Bryant Ross during that interview, his name was mentioned only once in passing along with other information about the accident, and plaintiff did not remember it some three and one half years later when she signed her original complaint. (Plaintiff's Complaint, attached as Addendum A; Plaintiff's Affidavit; Addendum C)
5. The only name plaintiff knew of regarding the accident at the time she signed her original complaint was Christopher Ross, whose name she knew because it was set forth in a 1997 letter from an insurance company, in which Christopher Ross was the only person listed as "our insured".

(Plaintiff's Affidavit, exhibit A thereto; Addendum C) .

6. Following service of plaintiff's original complaint upon Christopher Ross, on December 18, 2000, plaintiff's counsel received a recorded telephone message from defendant Christopher Ross saying that it was his son Bryant Ross who was involved in the accident. On January 2, 2001, plaintiff filed her First Amended Verified Complaint which was amended to add the name of Bryant Ross in place of fictitious name DOE 1. (Plaintiff's First Amended Verified Complaint, hereinafter Amended Complaint, attached hereto as Addendum D).
7. Defendants Bryant Ross and Christopher Ross were both served with the Amended Complaint at the Ross' home on January 8, 2001. (Return of Service, attached hereto as Addendum E) On January 22, 2001, Defendants Ross filed their Answer to the Amended Complaint.
8. The parties thereafter made their Initial Disclosures and the Stipulated Discovery Plan and upon which an Order was been signed and entered.
9. On May 9, 2001, Defendant Bryant Ross filed his Motion for Summary Judgment arguing that the statute of limitations had expired prior to the filing of Plaintiff's Amended Complaint which amended the original complaint to name Bryant Ross as the negligent driver who struck plaintiff and injured her and totalled her vehicle. (See Addendum F).

10. On May 18, 2001 Plaintiff filed her Memorandum of Points and Authorities in Opposition to Defendant Bryant Ross' Motion for Summary Judgment and Request for Hearing . (See Addendums G & H).
11. On June 16, 2001, Plaintiff filed her Memorandum of Points and Authorities in Response to Defendant Bryant Ross' Reply Memorandum in Support of Motion for Summary Judgment. (See Addendum I).
12. On September 6, 2001 the Trial Court made and entered its Minute Entry / Disposition Summary granting Defendant Bryant Ross' Motion for Summary Judgment. (See Addendum J).
13. On October 1, 2001, Plaintiff filed her Objection to Proposed Order Granting Defendant Bryant Ross' Motion for Summary Judgment. (See Addendum K).
14. On October 1, 2001, the Trial Court signed and entered the Order Granting Defendant Bryant Ross' Motion for Summary Judgment. (See Addendum L).

SUMMARY OF THE ARGUMENT

While generally URCP, Rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings, the Utah Supreme Court has made an exception to the general rule. The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so that notice to one serves to give notice

to the other and it can be assumed or proved that relation back is not prejudicial.

In this case, the party named as the defendant in Plaintiff's original Complaint, Christopher Ross, is the father of Bryant Ross, who was named as a defendant in Plaintiff's Amended Complaint which filed some six weeks after the original Complaint was filed. At the time that the automobile accident which gave rise to this case occurred, Bryant Ross was under 21 years of age and living at his father's home. Bryant Ross was insured under Christopher Ross' Insurance policy. Immediately following the accident, young Bryant Ross was hospitalized, as was Plaintiff (who suffered a broken bone). When Christopher Ross was later served with the original summons and complaint, he was at his home. That was the same home where both he and Bryant were served with the Amended Complaint shortly thereafter. It appears that Bryant Ross still was living at his father's home. Therefore, it would defy common sense to conclude that upon being served with the original Complaint regarding the accident that Bryant had caused, that Christopher Ross would not inform his son of this. After all, Christopher would have known that he had not caused that accident and would certainly remember his son being involved in an accident and having been hospitalized. Bryant Ross got notice of the proceedings following the service of the original Complaint on his father at their home. Additionally, because Plaintiff's Amended Complaint was filed and served only approximately six weeks after the original, there was no risk of prejudice to Bryant Ross by allowing the amendment to "relate back" to the filing date of the original Complaint. Moreover,

because both Christopher and Bryant were insured by the same company, with the same adjusters, investigators and attorneys, the information that those persons began gathering following the accident, and later service of the original Complaint upon Christopher Ross was available for use in defending either or both of the Ross's. Therefore, no prejudice can have resulted by virtue of the amendment "relating back" to the filing date of the original Complaint.

ARGUMENT

Point I

PLAINTIFF'S AMENDED COMPLAINT SHOULD RELATE BACK TO THE DATE OF THE FILING OF THE ORIGINAL COMPLAINT BASED UPON UTAH RULES OF CIVIL PROCEDURE, RULE 15(c)'s "RELATION BACK" DOCTRINE AND THE "IDENTITY OF INTEREST" EXCEPTION RECOGNIZED IN UTAH CASE LAW

The relation back doctrine is governed by Utah Rule of Civil Procedure 15(c), which provides that "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading" Utah R. Civ. P. 15(c).

While generally Rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings, the Utah Supreme Court has made an exception to the general rule. The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so it can be assumed or proved that relation back is not prejudicial.

In Wilcox v. Geneva Rock Corp., 911 P.2d 367 (Utah 1996), the Court quoted the above holding in Doxey-Layton, supra, as setting forth the applicable rule for finding that an “identity of interest” exists, and that therefore the exception would apply. Wilcox, at p. 370. Again, the crux of the determination is that the real parties in interest had notice of the proceedings (and thus were not prejudiced). In Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984), the Court stated that : “Identity of interest as used in this context means that the parties are so closely related in their business operations that **notice of the action against one serves to provide notice of the action to the other.**” Id. at p. 217. (Emphasis added). In Russell v. Standard Corp., 898 P.2d 263 (Utah 1995) the Court again held that the requirement for finding identity of interest is that the parties are so closely related that notice of the action against one serves to provide notice to the other. Id. at p. 265. In Sulzen v. Williams, 977 P.2d 497 (Utah App. 1999) the Court of Appeals quoted Wilcox, supra, which in turn had quoted Doxey-Layton, supra, for the rule set forth hereinabove in those cases.

The factor that those courts were looking for in each of those cases was notice to the real party in interest (so that relation back of an amendment was not prejudicial).

In the present case, **Christopher Ross, who was served with the original complaint, is the father of Bryant Ross, who was later served at the same residence where Christopher Ross was originally served.** Moreover, Christopher Ross knew that he had not been involved in an accident such as was described in Plaintiff’s original

Complaint. And, being that Bryant Ross was apparently seventeen years old at the time of the accident and was hospitalized following the accident, and given that Bryant Ross was apparently insured under Christopher Ross' policy (see Exhibit A to plaintiff's Declaration previously filed herein), it is entirely reasonable to assume that Christopher Ross was aware that Bryant Ross had been involved in the accident, and that he informed Bryant Ross of the Summons and Complaint that Christopher Ross had been served with at their home. Therefore, not only did Bryant Ross receive notice of plaintiff's action at that time, but it would have been clear that the action related to the accident that Bryant had been in.

Bryant Ross "can be reasonably assumed to have been alerted to the proceedings, or was involved in them unofficially from an early stage." No prejudice will result to Bryant Ross by the relation back of plaintiff's Amended Complaint to the date of the original Complaint. **Nor has Bryant Ross even made the suggestion that he would be prejudiced in any way by a relation back of the Amended Complaint.** The time between the filing of the original complaint and the amended complaint was only a little more than one month. Moreover, Christopher Ross and Bryant Ross are insured by the same company, and therefore, the evidence gathered by the insurer for each of the defendants Ross regarding the accident would be the same. Additionally, these defendants both have the same attorneys, which further demonstrates an identity of interest preventing prejudice from resulting.

On the other hand, plaintiff stands to lose her day in court for an adjudication upon the merits against the young driver who she alleges hit her, causing her to suffer, as plaintiff has alleged in her verified pleadings, broken bones, a trip to the hospital, and permanent injury. It should be noted that the parties hereto have made their Initial Disclosures and stipulated to a discovery plan which this Court has incorporated into an Order.

Point II

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO MAKE ANY FINDINGS OF FACTS WHATSOEVER REGARDING THE "IDENTITY OF INTEREST" EXCEPTION

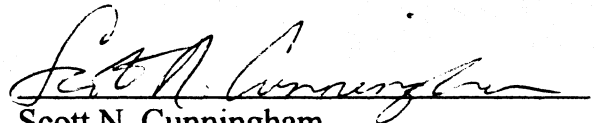
Plaintiff raised the "Identity of Interest" exception argument in opposition to Defendant Bryant Ross' Motion for Summary Judgment. (See Addendums G & I). Plaintiff also requested a hearing on the motion. (See Addendum H). Although the Trial Court considered that argument (See Addendum J), the court erred in making no factual findings regarding the "Identity of Interest" issue, other than to say "no identity of interest established". (See Addendum J).

CONCLUSION

Plaintiff had submitted sufficient evidence to establish that Christopher Ross and Bryant Ross had an "Identity of Interest" such as has been recognized in the Utah cases cited above as an exception to the "**Relation Back**" rule of URCP, Rule 15(c). Therefore, Plaintiff's Amended Complaint should have been held to have "related back" to the date that the original Complaint was filed, prior to the expiration of the statute of limitations.

Certainly, no prejudice could have resulted to Bryant Ross by allowing such an amendment. Lastly, Plaintiff should have her day in Court against the responsible party who caused the accident which permanently injured her and which has left her with unpaid medical bills in the thousands of dollars.

DATED this 25th day of June, 2002.




Scott N. Cunningham
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2002, I personally delivered a true and correct copy of the foregoing **Brief of Appellant** to the following:

Attorney for Defendant/ Appellee:

Michael W. Wright
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106

A handwritten signature in cursive script, appearing to read "Scott A. Cunningham", written over a horizontal line.

Case No. 20010943-CA
District Court Case No. 000909391

ADDENDUM A

ADDENDUM A

ADDENDUM A

ADDENDUM A

ADDENDUM A

ADDENDUM A

SCOTT N. CUNNINGHAM #6084
211 East 300 South, #216
Salt Lake City, Utah 84111
Telephone: (801) 364-1633

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

NANA PENROSE,	:	VERIFIED COMPLAINT FOR
	:	NEGLIGENCE AND JURY
Plaintiff,	:	DEMAND
vs.	:	
CHRISTOPHER ROSS, AN INDIVIDUAL,	:	Civil No. 000909341
AND DOES 1-5, INCLUSIVE, WHOSE	:	
TRUE NAMES ARE NOT KNOWN TO	:	Judge: DEVER
PLAINTIFF	:	
Defendants.	:	

COMES NOW the Plaintiff, Nana Penrose, and by and through her attorney, Scott N. Cunningham, and hereby alleges and complains against the Defendant as follows:

JURISDICTION AND VENUE

1. At all times relevant herein, the Plaintiff was a resident of Salt Lake County, State of Utah.
2. At all times relevant herein, Defendant Christopher Ross, was a resident of Salt Lake County, State of Utah. The true names and capacities, whether individual or otherwise, of defendants DOES 1-5, inclusive, are unknown to plaintiff who therefore sues said defendants by such fictitious names pursuant to Utah Rules of Civil

Procedure, Rules 9(a)(2) and 10. Plaintiff will seek leave to amend this Complaint to show their true names and capacities when the same have been ascertained. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants were agents, servants and employees of each of the remaining defendants and in so doing the things hereinafter mentioned were acting within the course and scope of such agency, service and employment and in doing the acts herein alleged were acting with the consent, permission, knowledge and authorization of each of the remaining defendants. All actions of each such defendant were ratified and approved by the officers, supervisors, or managing agents of every other defendant. Plaintiff is informed and believes, and thereon alleges, that each of the defendants designated herein as a DOE whose name is unknown is negligently responsible in some manner for the events and happenings herein referred to, and negligently caused the injuries and damages to plaintiff as alleged herein.

3. The facts and circumstances giving rise to this litigation occurred in Salt Lake County, State of Utah. The amount in controversy exceeds \$25,000.00, exclusive of costs. Jurisdiction and venue are proper in this Court.

FACTUAL ALLEGATIONS

4. All of the actions and events (hereinafter referred to as "the accident") of which complaint herein is made occurred on the 21st day of November, 1996 (hereinafter referred to as "the time

of the accident").

5. At the time of the accident Plaintiff was the owner of and operator of a certain automobile, operating upon the highways of Salt Lake County in conformity with all traffic regulations and responsibilities for the operation of said motor vehicle.

6. At the time of the accident, Defendant Christopher Ross, and DOES 1-5, was the owner of and was operating a certain automobile upon the highways of Salt Lake County, State of Utah, and did so in such a manner as to become the proximate cause of an accident between his motor vehicle and that of the Plaintiff.

7. At the time of the accident, Plaintiff was travelling southbound on 900 East Street at approximately 850 South, in Salt Lake City, County of Salt Lake, State of Utah.

8. At the time of the accident, Defendant Christopher Ross, and DOES 1-5 were travelling East in the aforesaid vehicle exiting the parking lot of Smith's Food and Drug store located at 876 East 800 South onto 900 East Street in Salt Lake City, County of Salt Lake, State of Utah. Defendant Christopher Ross and DOES 1-5 did at said time and place, and in the aforesaid vehicle, strike the Plaintiff's vehicle from the passenger side.

9. Defendant Christopher Ross and DOES 1-5 were negligent in the operation of the aforesaid vehicle in several aspects, including, but not limited to, the following:

a. He failed to pay proper attention to existing and changing traffic conditions;

b. He failed to look where he was going and, in fact, was

issued a traffic citation by the Salt Lake City Police Department charging him with a violation of applicable traffic laws in connection with the official investigation of the accident. Plaintiff alleges upon information and belief that Defendant Christopher Ross was required to pay a court imposed fine as a result of the said traffic violation;

c. He failed to lower his speed according to the existing and changing traffic conditions, with reckless disregard for the safety and welfare of others upon the road; and

d. He otherwise drove and operated his automobile improperly.

10. The accident which occurred and the injuries which have resulted to the Plaintiff are the proximate result of the negligence of Defendant Ross and DOES 1-5, as a result of those events hereinbefore described.

11. As a proximate result of the Defendants' negligence, the Plaintiff was injured. The Plaintiff sustained shock and injury to her brain, central nervous system, and spine, in at least the following particulars: neck, upper and lower back injuries, both to her spinal column and to the muscles, tendons and connective tissues, other whiplash-related injuries, and psychological and emotional damage, and a broken bone in her hand. As a proximate result of the negligence of Defendants, Plaintiff has sustained severe and continuing bodily injuries, including permanent impairment, which have caused her great pain and anguish of mind and body, sleeplessness, nausea, headaches and dizziness, and will

continue to experience such loss and damage in the future to Plaintiff's general damage, in an amount to be proven at the time of trial in this action.

12. As a further proximate result of the negligence of the Defendants, Plaintiff was required to, and did employ physicians for medical examinations and treatment, a chiropractor, and a licensed massage therapist for the care and treatment of these injuries, and did incur medical and incidental expenses in the sum exceeding \$3000.00 at present, and in an amount to be proven at time of trial.

13. As a further direct and proximate result of the negligence of the Defendants, Plaintiff has incurred and will yet incur further medical, chiropractic, massage and incidental expenses for care and treatment of these injuries, the exact amount of which is unknown at the present time. Plaintiff reserves the right to amend the Complaint at any time to show these expenses, or simply to show them at trial.

14. As a further direct and proximate result of the negligence of the Defendants, Plaintiff has incurred medical and incidental expenses for physicians, a chiropractor, a massage therapist, hospital services, x-rays, prescription drugs and medicines, equipment, and other care in an amount to be proven at trial.

15. As a further direct and proximate result of the negligence of Defendants, Plaintiff has been required to and did expend great amounts of time travelling to and from various

medical, chiropractic, and massage treatments, and continues to incur such loss, all to Plaintiff's damage in an amount to be proven at time of trial.

16. As a further direct and proximate result of the negligence of the Defendants, Plaintiff has suffered pain, emotional distress, permanent impairment, loss of enjoyment of life and other general damages in an amount to be proven at time of trial.

FIRST CAUSE OF ACTION

(Negligence)

17. Plaintiff incorporates by reference the allegations of paragraphs 1 through 16 above.

18. The negligence of the Defendants proximately caused injuries and damages to Plaintiff as alleged above.

19. Defendants are liable to the Plaintiff for damages in such categories and amounts to be proven at trial. Plaintiff should be awarded such damages as are proven at trial.

WHEREFORE, the Plaintiff prays for judgment against the Defendants as follows:

1. For general damages in an amount to be proven at trial.
2. For medical and incidental expenses, both past and future, in an amount to be proven at trial.
3. For other economic and out-of-pocket damages in an amount to be proven at trial.
4. For prejudgment interest on the damages assessed by the

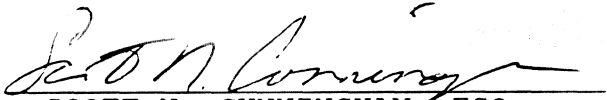
verdict of the jury, pursuant to Utah Code Annotated, 1953, Section 78-27-44, as amended, and postjudgment interest, and such other and further relief as the court deems just and proper.

5. For a trial by jury, the fee for which is attached hereto.

6. For costs of court.

7. For such other and further relief as the Court may deem appropriate.

Dated: November 17, 2000


SCOTT N. CUNNINGHAM, ESQ.
Attorney for Plaintiff

Plaintiff's attorney:

Scott N. Cunningham
211 East 300 South, Suite 216
Salt Lake City, Utah 84111

VERIFICATION UNDER OATH

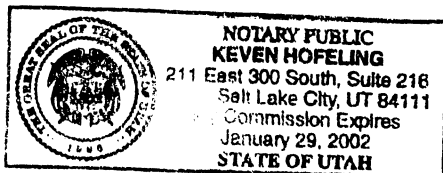
STATE OF UTAH)
 : ss.
County of Salt Lake)

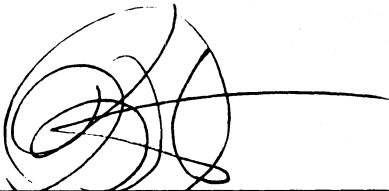
Nana Penrose, being first duly sworn under oath, deposes and says that she is the Plaintiff in the above-entitled matter and has read the foregoing VERIFIED COMPLAINT FOR NEGLIGENCE and knows the contents thereof and the same are true of her own knowledge except as to those matters herein stated upon information and belief, and as to those matters, she believes them to be true.

DATED this 17th day of Nov., 2000.

Nana Penrose
NANA-PENROSE - Plaintiff

SUBSCRIBED AND SWORN to before me this 17th day of
November, 2000.





NOTARY PUBLIC
Residing at Salt Lake County,
Utah

ADDENDUM B

FILED COURT
JAN-2 PM 1:00
COUNTY

RETURN OF SERVICE

STATE OF UTAH

COUNTY OF Salt Lake

I hereby make return of service and certify the following:

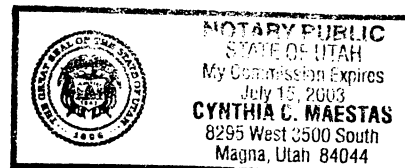
1. I am a person over the age of 21 years, and am not a party to the action.
2. I served Christopher Ross Defendant, () Plaintiff, () Witness,
() Other _____.
3. Type of Process:
 - a. ☒ Summons and Complaint
 - b. () Petition to Modify
 - c. () Order to Show Cause
 - d. () Subpoena
 - e. ☒ Other: Verified Complaint for Negligence & Jury Demand
Notice of ADR requirements
4. I served said process by:
 - a. ☒ Delivering a copy to Said individual personally at
6842 Pine Mountain Drive
Salt Lake City, Utah
 - b. () Leaving a copy with _____ a person of
suitable age and discretion at the above address for the person being served.
 - c. () Serving a company or corporation: _____ by leaving
a copy with _____ whose title is _____.
5. Date Received: 15 Dec, 2000 Date Served: 18 Dec, 2000
6. Before serving said process, I endorsed the following information in the upper right-hand
Corner of the Summons and showed the original to the person being served:
 - a. the name of the person being served,
 - b. the date the same was served,
 - c. the address of service,
 - d. my name, and
 - e. my signature.
7. Case No. 000909391 Service Fees: 21.00

I certify that the foregoing is true and correct and that this certificate is executed on the
17 day of December, 2000

[Signature]
Process Server

Subscribed and Sworn to before this 19 day of December, 2000

Cynthia C. Maestas
Notary Public



ADDENDUM C

SCOTT N. CUNNINGHAM #6084
Attorney for Plaintiff
211 East 300 South, Suite 216
Salt Lake City, Utah 84111
Telephone 801 364-1663

IN THE THIRD DISTRICT COURT - STATE OF UTAH

SALT LAKE COUNTY - SALT LAKE DEPARTMENT

NANA G. PENROSE,

PLAINTIFF,

-vs-

CHRISTOPHER ROSS, AN INDIVIDUAL, :
BRYANT ROSS, AN INDIVIDUAL (FOR- :
MERLY IDENTIFIED AS DOE 1), DOES :
2-5, INCLUSIVE, WHOSE TRUE NAMES :
ARE NOT KNOWN TO PLAINTIFF, :

DEFENDANTS. :

AFFIDAVIT OF PLAINTIFF NANA G.
PENROSE IN SUPPORT OF OPPOSITION
TO DEFENDANT BRYANT ROSS'
MOTION FOR SUMMARY
JUDGMENT

Civil No. 000909391

Judge: L.A. DEVER

STATE OF UTAH)
SS:
COUNTY OF SALT LAKE)

NANA G. PENROSE, being first duly sworn and under oath deposes and says as follows:

1. I am the plaintiff in the above-entitled action.
2. I am over the age of eighteen, and a resident of Salt Lake County, State of Utah.
3. At the time I signed my original Verified Complaint herein, if I had known the name of Bryant Ross and his identity as the actual driver of the vehicle that hit

me, I would certainly have named him as a defendant. When I signed the original Verified Complaint, I could not have told anyone Bryant Ross' name if my life depended on it.

4. On April 2, 1997, I gave a recorded statement over the telephone to a man from an insurance company about the accident that is the subject of this lawsuit. He mentioned the name of the other driver one time during that conversation, at the same time he asked about the date and location of the accident.
5. I have never received a copy of the transcript of that interview, and had never seen it until the present motion was filed with it as an attachment. It had been over three and one half years since that conversation when I signed my original Verified Complaint herein. I could not remember Bryant Ross' name, and to tell the truth, the man taking the statement ran it past me pretty quick at the same time he was asking about other information.
6. I had never even seen the police report regarding the accident until it was sent by defendant's attorney to my attorney as an exhibit to the Affidavit of Christopher Ross, previously filed herein. My attorney had attempted to obtain a copy of the police report prior to my signing of my original complaint, but with just my name and Christopher Ross' name, the police records department could not locate any record of it. Again, had I known the name of Bryant Ross, I could have supplied that information to my attorney and then the police would probably have been able to locate the report.
7. The only written information regarding any potential defendant that I still had in my possession and that I could find before signing my original Verified

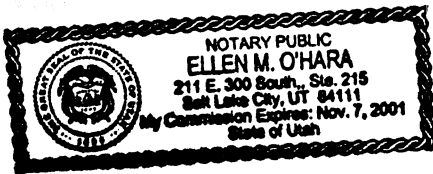
Complaint herein, was a letter from State Farm Insurance regarding payment for my medical expenses. It identified only Christopher Ross as their insured. That is how I knew even his name. A true and correct copy of the letter is attached hereto as exhibit A.

8. Again, if I had known Bryant Ross' name, I would have named him as a defendant in my original complaint.

DATED: 5-17, 2001

Nana G. Penrose
NANA G. PENROSE

Subscribed and sworn to before me the undersigned Notary this 17th day of May, 2001.



Ellen M. O'Hara
Notary Public
Residing at:

☒ Oath Physically Administered

CERTIFICATE OF MAILING

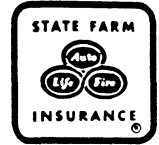
I hereby certify that on this 18th day of May, 2001, I mailed a true and correct copy of
the foregoing AFFIDAVIT OF NANA G. PENROSE IN SUPPORT OF OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT to:

Michael W. Wright
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106

Scott N. Cunningham

EXHIBIT A

State Farm Insurance Companies



August 18, 1997

State Farm Insurance Company
West Valley Service Center
2655 South Lake Erie Drive
P. O. Box 30463
Salt Lake City, UT 84130
Telephone: (801) 956-4000

Ms. Nana Penrose
1632 Princeton Avenue
Salt Lake City, UT 84105

Re: Claim: 44 1015 121
Our Insured: Christopher Ross
Date of Loss: November 21, 1996

Dear Ms. Penrose:

Per our letter dated to you April 2, 1997, please be advised that the Sandy Service Center under your claim 44 0997 907 has paid the sum of \$5,000 in medical expenses on your behalf.

Unless we hear from you or your legal representative within the next 30 days, we will assume that you are satisfied with the handling of your claim, and we will close our file.

Sincerely,

Felix Jensen
Claim Specialist
Phone: (801) 956-4011
State Farm Mutual Automobile Insurance Company

FJ/es 014/0818024

ADDENDUM D

SCOTT N. CUNNINGHAM #6084
211 East 300 South, #216
Salt Lake City, Utah 84111
Telephone: (801) 364-1633

FILED
THIRD JUDICIAL DISTRICT COURT
2001 JAN -2 PM 1:00
SALT LAKE COUNTY

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

NANA PENROSE,	:	FIRST AMENDED VERIFIED
	:	COMPLAINT AND DEMAND FOR
Plaintiff,	:	JURY TRIAL
vs.	:	
CHRISTOPHER ROSS, AN INDIVIDUAL,	:	Civil No. 000909391 PI
BRYANT ROSS, AN INDIVIDUAL (FOR-	:	
MERLY IDENTIFIED AS DOE 1), DOES :	:	
2-5, INCLUSIVE, WHOSE TRUE NAMES	:	
ARE NOT KNOWN TO PLAINTIFF	:	Judge: L.A. DEVER
PLAINTIFF	:	
Defendants.	:	

COMES NOW the Plaintiff, Nana Penrose, and by and through her attorney, Scott N. Cunningham, and hereby amends her original Verified Complaint and alleges and complains against the Defendants as follows:

JURISDICTION AND VENUE

1. At all times relevant herein, the Plaintiff was a resident of Salt Lake County, State of Utah.
2. At all times relevant herein, Defendants Christopher Ross, and Bryant Ross (formerly identified as DOE 1 in plaintiff's original Verified Complaint) were residents of Salt Lake County, State of Utah. The true names and capacities, whether individual

or otherwise, of defendants DOES 2-5, inclusive, are unknown to plaintiff who therefore sues said defendants by such fictitious names pursuant to Utah Rules of Civil Procedure, Rules 9(a)(2) and 10. Plaintiff will seek leave to amend this Complaint to show their true names and capacities when the same have been ascertained. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants were agents, servants and employees of each of the remaining defendants and in so doing the things hereinafter mentioned were acting within the course and scope of such agency, service and employment and in doing the acts herein alleged were acting with the consent, permission, knowledge and authorization of each of the remaining defendants. All actions of each such defendant were ratified and approved by the officers, supervisors, or managing agents of every other defendant. Plaintiff is informed and believes, and thereon alleges, that each of the defendants designated herein as a DOE whose name is unknown is negligently responsible in some manner for the events and happenings herein referred to, and negligently caused the injuries and damages to plaintiff as alleged herein.

3. The facts and circumstances giving rise to this litigation occurred in Salt Lake County, State of Utah. The amount in controversy exceeds \$25,000.00, exclusive of costs. Jurisdiction and venue are proper in this Court.

FACTUAL ALLEGATIONS

4. All of the actions and events (hereinafter referred to as

"the accident") of which complaint herein is made occurred on the 21st day of November, 1996 (hereinafter referred to as "the time of the accident").

5. At the time of the accident Plaintiff was the owner of and operator of a certain automobile, operating upon the highways of Salt Lake County in conformity with all traffic regulations and responsibilities for the operation of said motor vehicle.

6. At the time of the accident, Defendant Christopher Ross, was the owner of and Defendant Bryant Ross (formerly identified as DOE 1 in Plaintiff's original Verified Complaint) was operating a certain automobile upon the highways of Salt Lake County, State of Utah, and did so in such a manner as to become the proximate cause of an accident between his motor vehicle and that of the Plaintiff.

7. At the time of the accident, Plaintiff was travelling southbound on 900 East Street at approximately 850 South, in Salt Lake City, County of Salt Lake, State of Utah.

8. At the time of the accident, Defendant Bryant Ross (formerly identified as DOE 1 in Plaintiff's original Verified Complaint) and DOES 2-5 were travelling East in the aforesaid vehicle exiting the parking lot of Smith's Food and Drug store located at 876 East 800 South onto 900 East Street in Salt Lake City, County of Salt Lake, State of Utah. Defendant Bryant Ross (formerly identified as DOE 1 in Plaintiff's original Verified Complaint) and DOES 2-5 did at said time and place, and in the aforesaid vehicle, strike the Plaintiff's vehicle from the

passenger side.

9. Defendant Bryant Ross (formerly identified as DOE 1 in Plaintiff's original Verified Complaint) and DOES 2-5 were negligent in the operation of the aforesaid vehicle in several aspects, including, but not limited to, the following:

a. He failed to pay proper attention to existing and changing traffic conditions;

b. He failed to look where he was going and, in fact, was issued a traffic citation by the Salt Lake City Police Department charging him with a violation of applicable traffic laws in connection with the official investigation of the accident. Plaintiff alleges upon information and belief that Defendant Byrant Ross was required to pay a court imposed fine as a result of the said traffic violation;

c. He failed to lower his speed according to the existing and changing traffic conditions, with reckless disregard for the safety and welfare of others upon the road; and

d. He otherwise drove and operated his automobile improperly.

10. The accident which occurred and the injuries which have resulted to the Plaintiff are the proximate result of the negligence of Defendant Bryant Ross (formerly identified as DOE 1 in Plaintiff's original Verified Complaint) and DOES 2-5, as a result of those events hereinbefore described.

11. As a proximate result of the Defendants' negligence, the Plaintiff was injured. The Plaintiff sustained shock and injury to

her brain, central nervous system, and spine, in at least the following particulars: neck, upper and lower back injuries, both to her spinal column and to the muscles, tendons and connective tissues, other whiplash-related injuries, and psychological and emotional damage, and a broken bone in her hand. As a proximate result of the negligence of Defendants, Plaintiff has sustained severe and continuing bodily injuries, including permanent impairment, which have caused her great pain and anguish of mind and body, sleeplessness, nausea, headaches and dizziness, and will continue to experience such loss and damage in the future to Plaintiff's general damage, in an amount to be proven at the time of trial in this action.

12. As a further proximate result of the negligence of the Defendants, Plaintiff was required to, and did employ physicians for medical examinations and treatment, a chiropractor, and a licensed massage therapist for the care and treatment of these injuries, and did incur medical and incidental expenses in the sum exceeding \$3000.00 at present, and in an amount to be proven at time of trial.

13. As a further direct and proximate result of the negligence of the Defendants, Plaintiff has incurred and will yet incur further medical, chiropractic, massage and incidental expenses for care and treatment of these injuries, the exact amount of which is unknown at the present time. Plaintiff reserves the right to amend the Complaint at any time to show these expenses, or simply to show them at trial.

14. As a further direct and proximate result of the negligence of the Defendants, Plaintiff has incurred medical and incidental expenses for physicians, a chiropractor, a massage therapist, hospital services, x-rays, prescription drugs and medicines, equipment, and other care in an amount to be proven at trial.

15. As a further direct and proximate result of the negligence of Defendants, Plaintiff has been required to and did expend great amounts of time travelling to and from various medical, chiropractic, and massage treatments, and continues to incur such loss, all to Plaintiff's damage in an amount to be proven at time of trial.

16. As a further direct and proximate result of the negligence of the Defendants, Plaintiff has suffered pain, emotional distress, permanent impairment, loss of enjoyment of life and other general damages in an amount to be proven at time of trial.

FIRST CAUSE OF ACTION

(Negligence)

17. Plaintiff incorporates by reference the allegations of paragraphs 1 through 16 above.

18. The negligence of the Defendants proximately caused injuries and damages to Plaintiff as alleged above.

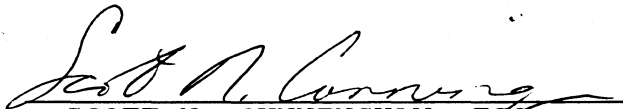
19. Defendants are liable to the Plaintiff for damages in such categories and amounts to be proven at trial. Plaintiff should

be awarded such damages as are proven at trial.

WHEREFORE, the Plaintiff prays for judgment against the Defendants as follows:

1. For general damages in an amount to be proven at trial.
2. For medical and incidental expenses, both past and future, in an amount to be proven at trial.
3. For other economic and out-of-pocket damages in an amount to be proven at trial.
4. For prejudgment interest on the damages assessed by the verdict of the jury, pursuant to Utah Code Annotated, 1953, Section 78-27-44, as amended, and postjudgment interest, and such other and further relief as the court deems just and proper.
5. For a trial by jury, the fee for which is attached hereto.
6. For costs of court.
7. For such other and further relief as the Court may deem appropriate.

Dated: December 27, 2000


SCOTT N. CUNNINGHAM, ESQ.
Attorney for Plaintiff

Plaintiff's attorney:

Scott N. Cunningham
211 East 300 South, Suite 216
Salt Lake City, Utah 84111

VERIFICATION UNDER OATH

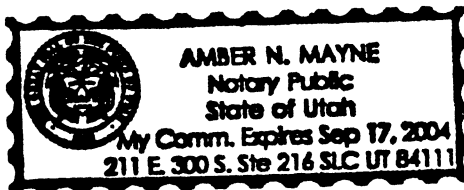
STATE OF UTAH)
 : ss.
County of Salt Lake)

Nana Penrose, being first duly sworn under oath, deposes and says that she is the Plaintiff in the above-entitled matter and has read the foregoing FIRST AMENDED VERIFIED COMPLAINT FOR NEGLIGENCE and knows the contents thereof and the same are true of her own knowledge except as to those matters herein stated upon information and belief, and as to those matters, she believes them to be true.

DATED this 2 day of January, 2001.

Nana Penrose
NANA PENROSE - Plaintiff

SUBSCRIBED AND SWORN to before me this 2nd day of
January, 2001.



Amber N. Mayne
NOTARY PUBLIC
Residing at Salt Lake County,
Utah

Oath ☒

ADDENDUM E

SCOTT N. CUNNINGHAM (6084)
211 East 300 South, #216
Salt Lake City, Utah 84111
Telephone: (801) 364-1663

Attorney for Plaintiff

Served Bryant Ross
Christopher Ross
Address 6842 Pine Mt. Dr. SLC, UT
Date 8 Jan. 2001
Server John L. Riddle
Signature John L. Riddle

BY JOHN L. RIDDLE
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

NANA PENROSE,	:	FIRST AMENDED SUMMONS
Plaintiff,	:	
vs.	:	
CHRISTOPHER ROSS, AN INDIVIDUAL,	:	Civil No. 000909391 PI
BRYANT ROSS, AN INDIVIDUAL (FOR-	:	
MERLY IDENTIFIED AS DOE 1), DOES :	:	
2-5, INCLUSIVE, WHOSE TRUE NAMES	:	
ARE NOT KNOWN TO PLAINTIFF	:	Judge: L.A. DEVER
Defendants.	:	

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to file an Answer in writing to the attached First Amended Verified Complaint with the Clerk of the Third Judicial District Court, located at 450 South State Street, Salt Lake City, Utah 84111 and serve upon, or mail to, Scott N. Cunningham, Attorney for the Plaintiff, 211 East 300 South, #216, Salt Lake City, Utah 84111, a copy of said Answer within twenty (20) days after service of this First Amended Summons upon you.

If you fail to do so, judgment by default will be taken against you for the relief demanded in said First Amended Verified

RETURN OF SERVICE

STATE OF UTAH

01 JAN 10 PM 2001

COUNTY OF Salt Lake

I hereby make return of service and certify the following:

1. I am a person over the age of 21 years, and am not a party to the action.
2. I served Christopher Ross ☒ Defendant, ☐ Plaintiff, ☐ Witness,
☐ Other _____.
3. Type of Process:
 - a. ☒ Summons and Complaint
 - b. ☐ Petition to Modify
 - c. ☐ Order to Show Cause
 - d. ☐ Subpoena
 - e. ☒ Other: First Amended Complaint, Notice of ADR requirements
4. I served said process by:
 - a. ☒ Delivering a copy to Said individual personally at
6842 PINE MTN. DR.
SALT LAKE CITY, UTAH
 - b. ☐ Leaving a copy with _____ a person of
suitable age and discretion at the above address for the person being served.
 - c. ☐ Serving a company or corporation: _____ by leaving
a copy with _____ whose title is _____.
5. Date Received: 4 JAN. 2001 Date Served: 8 JAN. 2001

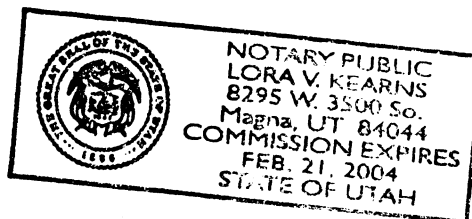
6. Before serving said process, I endorsed the following information in the upper right-hand
Corner of the Summons and showed the original to the person being served:
 - a. the name of the person being served,
 - b. the date the same was served,
 - c. the address of service,
 - d. my name, and
 - e. my signature.

7. Case No. 000909391 PI Service Fees: 21.00
I certify that the foregoing is true and correct and that this certificate is executed on the
9 day of January, 2001

[Signature]
Process Server

Subscribed and Sworn to before this 9th day of January, 2001

Lora V. Kearns
Notary Public



RETURN OF SERVICE

STATE OF UTAH

COUNTY OF Salt Lake

I hereby make return of service and certify the following:

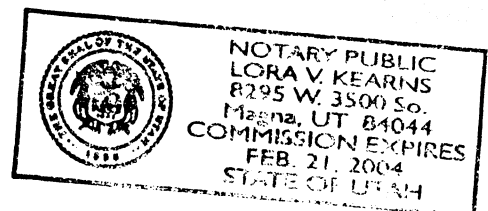
1. I am a person over the age of 21 years, and am not a party to the action.
2. I served Bryant Ross ☒ Defendant, () Plaintiff, () Witness,
() Other _____.
3. Type of Process:
 - a. ☒ Summons and Complaint
 - b. () Petition to Modify
 - c. () Order to Show Cause
 - d. () Subpoena
 - e. ☒ Other: First Amended Complaint
4. I served said process by:
 - a. ☒ Delivering a copy to Said individual personally at
6842 Pine Mtn. Dr.
Salt Lake City, Utah
 - b. () Leaving a copy with _____ a person of
suitable age and discretion at the above address for the person being served.
 - c. () Serving a company or corporation: _____ by leaving
a copy with _____ whose title is _____.
5. Date Received: 4 Jan. 2001 Date Served: 8 Jan. 2001
6. Before serving said process, I endorsed the following information in the upper right-hand
Corner of the Summons and showed the original to the person being served:
 - a. the name of the person being served,
 - b. the date the same was served,
 - c. the address of service,
 - d. my name, and
 - e. my signature.
7. Case No. 000909391 PI Service Fees: 6.00
I certify that the foregoing is true and correct and that this certificate is executed on the
9 day of January, 2001

[Signature]

Process Server

Subscribed and Sworn to before this 9th day of January, 2001

Lora V. Kearns
Notary Public



ADDENDUM F

Richard K. Glauser, #4324
Michael W. Wright, #6153
SMITH & GLAUSER, P.C.
Attorneys for Defendant
Parkview Plaza
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106
(801) 466-4228

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

NANA PENROSE,

Plaintiff,

v.

CHRISTOPHER ROSS, an individual,
BRYANT ROSS, an individual, and Does
2-5, inclusive, whose true names are not
known to Plaintiff.

Defendants.

**DEFENDANT BRYANT ROSS'S
MOTION FOR SUMMARY JUDGMENT**

Civil No. 000909391
Judge L.A. Dever

Defendant Bryant Ross, through his counsel of record, respectfully moves the court
for summary judgment dismissing all claims alleged against him by Plaintiff Nana Penrose.

This motion is based upon the following facts, grounds and circumstances:

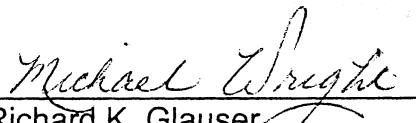
1. The accident underlying this complaint occurred on November 21, 1996, in Salt Lake City, Utah;
2. Plaintiff filed her complaint against Defendant Bryant Ross on or about January 2, 2001;

3. The statute of limitation governing this action is four years;
4. Defendant Bryant Ross alleged in the answer to his complaint that the cause of action against him was barred by the applicable statute of limitations;
5. This provides him with a complete defense to this action; and,
6. For such other reasons as are set out in the accompanying memorandum of law.

Wherefore Defendant Bryant Ross prays that the court grant his motion for summary judgment, that it dismiss all claims against him, and that he be granted such other relief as is just and equitable in the circumstances.

Dated this 5th day of May, 2001.

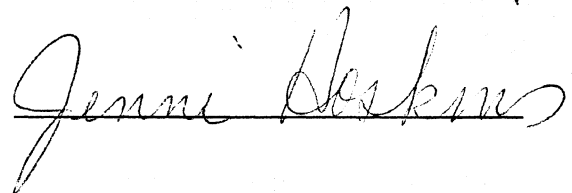
Smith & Glauser


Richard K. Glauser
Michael W. Wright

Certificate of Service

I certify that a true and correct copy of the foregoing document was mailed, postage pre-paid, this 8 day of May 8, 2001, to:

Scott N. Cunningham
211 East 300 South, Suite 216
Salt Lake City, UT 84111



Richard K. Glauser, #4324
Michael W. Wright, #6153
SMITH & GLAUSER, P.C.
Attorneys for Defendant
Parkview Plaza
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106
(801) 466-4228

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

NANA PENROSE,

Plaintiff,

V.

CHRISTOPHER ROSS, an individual,
BRYANT ROSS, an individual, and Does
2-5, inclusive, whose true names are not
known to Plaintiff.

Defendants.

**DEFENDANT CHRISTOPHER ROSS'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Civil No. 000909391
Judge L.A. Dever

Christopher Ross, by and through his undersigned counsel or record, respectfully submits the following memorandum of law in support of his motion for summary judgment.

Statement of Undisputed Facts

1. The case is based upon an automobile accident which occurred on November 23, 1996 in Salt Lake City, Utah. (Complaint and Amended Complaint)

2. Plaintiff filed her first complaint in this matter on or about November 17, 2000 alleging that Defendant Christopher Ross was operating the vehicle which collided with hers. (Complaint)

3. On January 2, 2001 Plaintiff amended her complaint to name Bryant Ross as a defendant, alleging that he was driving the vehicle which collided with hers. (Amended Complaint)

4. The amended complaint alleges that Defendant Christopher Ross was the owner of the vehicle that struck her on November 23, 1996, but does not allege that he was driving the vehicle at the time of the accident. (Amended Complaint)

5. Defendant Christopher Ross was not driving the vehicle at the time of the accident. (Affidavit of Christopher Ross)

Argument

The Owner of an Automobile is not Liable for the negligence of the driver of the automobile.

When Plaintiff initiated this action, she began by asserting that Mr. Christopher Ross was the driver of the other vehicle that collided with hers in November of 1996, and that the collision resulted from his negligent operation of the vehicle. Subsequently, Plaintiff determined that this was not the case, and she amended her complaint to name the individual who was actually operating the vehicle at the time of the collision. Unfortunately, she did not dismiss this defendant from the action at that time, instead she simply stated that he was liable because he owned the subject vehicle.

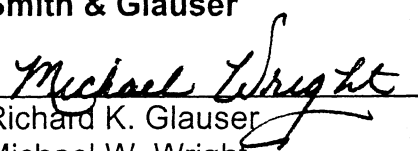
It is a matter of well-established law that an owner of a vehicle is not liable for the negligent operation of that vehicle by another individual, unless there are other

extraordinary circumstances. *Lane v. Messer* 731 P.2d (Utah 1986). The most common of these occur when the owner entrusts his automobile to one who is intoxicated or who is known to the owner to be an unsafe driver. In those cases, the owner is deemed to be negligent because he has allowed his automobile to be used by an individual who is likely to cause harm to others. Similarly, owners have been held to be susceptible to causes of action sounding in negligence if they allow others to use an automobile which was in obvious disrepair. See generally, 60A C.J.S. *Motor Vehicles* §428, et.seq.

In this case, nothing of this sort has been alleged, and without a basis for predicated liability on Mr. Christopher Ross, the court should grant his motion for judgment as a matter of law, and dismiss all outstanding causes of action against him.

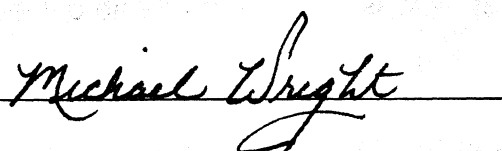
DATED this 29 day of August, 2001.

Smith & Glauser


Richard K. Glauser
Michael W. Wright

Certificate of Service

I certify that a true and correct copy of the foregoing document was mailed, postage pre-paid, this 29 day of August, 2001 to:
Scott N. Cunningham
211 East 300 South, Suite 216
Salt Lake City, UT 84111



RICHARD K. GLAUSER (4324)
MICHAEL W. WRIGHT (6153)
SMITH & GLAUSER, P.C.
Parkview Plaza
2180 South 1300 East, Suite 600
Salt Lake City, UT 84106
(801) 466-4228
Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

NANA PENROSE,)	
)	
Plaintiff,)	AFFIDAVIT OF DEFENDANT
v.)	CHRISTOPHER ROSS
)	
CHRISTOPHER ROSS, an individual and)		
Does 1-5, inclusive, whose true names are)		
not known to Plaintiff.)	Civil No.: 000909391
)	
Defendants.)	Judge L.A. Dever

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

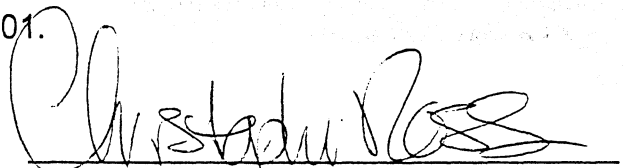
I, Christopher Ross, being first duly sworn upon oath, depose and state as follows:

1. I am the Defendant in this matter, I have received and reviewed the complaint filed by Plaintiff and am familiar with the allegations contained therein; and, I have first hand knowledge of the facts set out in this affidavit and am competent to testify to the matters stated herein;

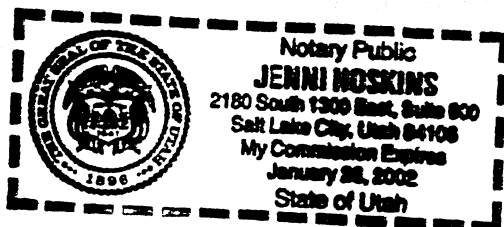
2. At the time of the accident identified in Plaintiff's complaint, I was the owner of a red 1989 Honda Accord, VIN JHMCA5539KCO76925;
3. This automobile was involved in a collision with Plaintiff, however, I was not driving the vehicle at the time the accident occurred nor was I a passenger or otherwise present in the vehicle when the accident occurred;
4. My son Bryant Ross told me that he was driving the vehicle in question when the accident occurred, a fact which is reflected in and corroborated by the official accident report composed by the investigating officer in this matter;
(A copy of the report is attached to this affidavit as Exhibit A)


FURTHER, AFFIANT SAYETH NOT.

DATED this 5 day of January, 2001.


CHRISTOPHER ROSS

SUBSCRIBED AND SWORN to before me this 5 day January, 2001.




NOTARY PUBLIC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was mailed,
postage pre-paid, this 5 day of January 5, 2001, to:

Scott N. Cunningham
211 East 300 South, Suite 216
Salt Lake City, UT 84111

Jenni Hoskins

ADDENDUM G

Information is provided to the public in accordance with the provisions of the Freedom of Information Act.

Information is provided to the public in accordance with the provisions of the Freedom of Information Act.

Information is provided to the public in accordance with the provisions of the Freedom of Information Act.

Information is provided to the public in accordance with the provisions of the Freedom of Information Act.

Information is provided to the public in accordance with the provisions of the Freedom of Information Act.

ADDENDUM G

SCOTT N. CUNNINGHAM #6084
Attorney for Plaintiff
211 East 300 South, Suite 216
Salt Lake City, Utah 84111
Telephone 801 364-1663

IN THE THIRD DISTRICT COURT - STATE OF UTAH
SALT LAKE COUNTY - SALT LAKE DEPARTMENT

NANA G. PENROSE,	:	
	:	PLAINTIFF'S MEMORANDUM OF
	:	POINTS AND AUTHORITIES IN
PLAINTIFF,	:	OPPOSITION TO DEFENDANT BRYANT
	:	ROSS' MOTION FOR SUMMARY
	:	JUDGMENT
-vs-	:	
	:	Civil No. 000909391
CHRISTOPHER ROSS, AN INDIVIDUAL,	:	
BRYANT ROSS, AN INDIVIDUAL (FOR-	:	Judge: L.A. DEVER
MERLY IDENTIFIED AS DOE 1), DOES	:	
2-5, INCLUSIVE, WHOSE TRUE NAMES	:	
ARE NOT KNOWN TO PLAINTIFF,	:	
DEFENDANTS.	:	

COMES NOW the plaintiff, Nana Penrose, through her attorney, and submits the following Memorandum of Points and Authorities in Support of Opposition to Defendant Bryant Ross' Motion for Summary Judgment.

STATEMENT OF GENUINE ISSUES

This is an automobile accident case. Genuine issues of fact exist with respect to whether defendant Bryant Ross negligently operated a vehicle causing a collision with plaintiff's vehicle

thereby proximately causing injuries to her and other damages.

Plaintiff originally named Christopher Ross as a defendant, and sued defendant Bryant Ross under the fictitious name of DOE 1, because she did not know his name. Her complaint was filed within the four-year statute of limitations. Upon learning Bryant Ross' true identity, plaintiff filed an amended complaint some one and one half months following the filing of her original complaint, substituting his name for DOE 1. In the time between the filing of the original and amended complaints, the statute of limitations had expired. Defendants Ross were timely served with the amended complaint.

Defendant Bryant Ross argues that plaintiff has amended her complaint **to add a new party**, and that the new party was added after the statute of limitations had expired. This flies in the face of Utah Rules of Civil Procedure, Rule 9(a)(2) which clearly allows a party to be sued from the start of an action but under a fictitious name. What would the point of that provision be if defendant's argument was valid? Defendant Bryant Ross then seems to acknowledge the nature and effect of the provisions of Rule 9 (Defendant's Memorandum at p.5, para. 2, last sentence), but argues that although plaintiff actually knew Bryant Ross' name, she somehow did not list him by name as a defendant in her original complaint, and therefore cannot take advantage of the provisions of Rule 9, URCP.

Therefore, it appears that a genuine issue exists as to whether plaintiff "knew" Bryant Ross' name at the time she filed her original complaint.

STATEMENT OF MATERIAL FACTS

1. This case arises out of an automobile accident involving plaintiff which occurred in Salt Lake City, Utah on November 26, 1996. (Verified Complaint, attached as exhibit A)

2. On the date plaintiff filed her original Verified Complaint herein (hereinafter "original complaint"), November 17, 2001, plaintiff did not know the name of the individual Bryant Ross. (Original Complaint, attached as exhibit A; Affidavit of Nana G. Penrose in Support of Opposition to Motion for Summary Judgment, hereinafter "plaintiff's affidavit", filed herewith). See defendant Ross' Undisputed Fact Number 4. The moving defendant is relying upon information and records which have never been a part of the records in this action in order to bring the present motion, which is not in accordance with Rule 4-501(2)(a). See Plaintiff's Objection to Defendant's Exhibits in Support of Motion for Summary Judgment, hereinafter "plaintiff's objection to exhibits", filed herewith. In addition to Christopher Ross, plaintiff sued persons whose true identities were unknown to her under the fictitious names of DOES 1-5, and stated that those persons, along with Christopher Ross were negligently responsible for her injuries and damages. This was done in accordance with Utah Rules of Civil Procedure, Rule 9 (a)(2). (Original Complaint)

3. Plaintiff had never received a copy of the Police Report regarding the accident until defendant's counsel provided it to plaintiff's counsel in January, 2001. (Affidavit of Nana G. Penrose in Support of Opposition to Motion for Summary Judgment, hereinafter "plaintiff's affidavit", filed herewith). See movant's Undisputed Fact Number 4. Because plaintiff did not know Bryant Ross' name, attempts to obtain a copy of the accident report from the police department by plaintiff's counsel were unsuccessful. (Plaintiff's Affidavit)

4. Plaintiff gave a recorded statement regarding the accident in April, 1997, but never received a copy of that statement. (Plaintiff's Affidavit) See movant's Undisputed Fact Number 4. See also Plaintiff's Objection to Exhibits filed herewith. Although the person taking

the statement apparently mentioned the name Bryant Ross during that interview, his name was mentioned only once in passing along with other information about the accident, and plaintiff did not remember it some three and one half years later when she signed her original complaint. (Plaintiff's Complaint, attached as exhibit A; Plaintiff's Affidavit)

5. The only name plaintiff knew of regarding the accident at the time she signed her original complaint was Christopher Ross, whose name she knew because it was set forth in a 1997 letter from an insurance company, in which Christopher Ross was the only person listed as "our insured". (Plaintiff's Affidavit, exhibit A thereto) See movant's Undisputed fact Number 4.

6. Following service of plaintiff's original complaint upon Christopher Ross, on December 18, 2000, plaintiff's counsel received a recorded telephone message from defendant Christopher Ross saying that it was his son Bryant Ross who was involved in the accident. On January 2, 2001, pursuant to Rule 9 (a)(2), URCP, having learned of the true identity of the person previously designated as DOE 1 in plaintiff's original complaint, plaintiff filed her First Amended Verified Complaint in which the name of Bryant Ross was substituted for the fictitious name DOE 1. (Plaintiff's First Amended Verified Complaint, hereinafter Amended Complaint, attached hereto as exhibit B). See movant's Undisputed Fact Number 3.

7. Defendants Bryant Ross and Christopher Ross were both served with the Amended Complaint at the Ross' home on January 8, 2001. (Return of Service, attached hereto as exhibit C)

8. On January 22, 2001, Defendants Ross filed their Answer to the Amended Complaint.

9. The parties have made their Initial Disclosures and the Stipulated Discovery Plan

and Order has been signed and entered herein. (Filed herein)

DISPUTED FACTS

10. Plaintiff disputes that her initial complaint was filed on November 17, 2001. It was filed on November 17, 2000. See defendant's Undisputed fact Number 2. (Complaint)

11. Plaintiff disputes that portion of defendant's Undisputed Fact Number 3, wherein it is stated that by filing her Amended Complaint she "attempted" to substitute the name of Bryant Ross for one of the Doe defendants. Plaintiff did, in fact, substitute Bryant Ross' name for Doe 1. (Amended Complaint)

12. Plaintiff disputes defendant's Undisputed Fact Number 4. Plaintiff did not know that Bryant Ross was the driver of the other vehicle that was involved in the accident on or before she filed her original complaint on November 17, 2000. If she had known that information, she would have named Bryant Ross as a defendant in her original complaint.

(Complaint, plaintiff's affidavit) Although it is not even the relevant standard, plaintiff also disputes that she had reason to know Bryant Ross' name at that time. Following the accident Plaintiff was disoriented and had two broken bones in her hand was taken from the scene of the accident to an emergency room in an ambulance. She had not seen the police report or the transcript of her statement made in April of 1997, in which Bryant Ross' name was mentioned once. (Plaintiff's affidavit) The only written information she had with any potential defendant's name on it was a letter from 1997 which referred to Christopher Ross as the insurance company's insured. (Plaintiff's affidavit, exhibit A thereto)

I
ARGUMENT

**A DEFENDANT DESIGNATED BY A FICTITIOUS NAME PURSUANT TO UTAH
RULES OF CIVIL PROCEDURE, RULE 9(a)(2) IS CONSIDERED TO BE A PARTY TO
THE ACTION FROM THE DATE THE ORIGINAL ACTION WAS FILED**

URCP Rule 9(a)(2) provides:

“Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.”

This is precisely what plaintiff did in this case. When plaintiff learned defendant Bryant Ross’ name, she amended her complaint to substitute Bryant Ross’ true name for the fictitious name DOE 1. Pursuant to Rule 9, this was not adding a new party, but was properly identifying an existing party whose name was not known to plaintiff and who was sued in the original complaint under a fictitious name within the time allowed by the applicable statute of limitations. No Utah case was found which discussed this particular provision. Several California cases discussing California Code of Civil Procedure Section 474, “Defendant Designated by Fictitious Name” state the effect of the rule. A copy of that statute is attached hereto as exhibit D. A defendant who was designated by a fictitious name and whose true name was later discovered and substituted by amendment is considered to have been a party to the action from the date the original complaint was filed. Garrett v. Crown Coach Corp. (1968) 66 Cal.Rptr. 590, 259 C.A.2d 647; California State Auto Ass’n., Inter-Ins. Bureau v. Cohen (1975) 118 Cal.Rptr. 890, 44 C.A.3d 387; Snoke v. Bolen (App. 1 Dist. 1991) 1 Cal.Rptr.2d 492, 235 Cal.App.3d 1427; Balon v. Drost (App.1 Dist. 1991) 25 Cal.Rptr.2d 12, 20 Cal. App.4th 483.

II

PLAINTIFF'S DESIGNATION OF DEFENDANT BRYANT ROSS BY A FICTITIOUS NAME IN HER ORIGINAL COMPLAINT WAS PROPER BECAUSE SHE DID NOT KNOW HIS NAME

First of all, had plaintiff known Bryant Ross' name at the time she signed and filed her original complaint, she would have specifically named him as a defendant using his real name.

If plaintiff really even "caught" that name when it was quickly mentioned one time by an insurance adjuster in April of 1997 (along with many other facts regarding the accident) she did not remember it more than three and one half years later when she filed her original complaint. (Following the accident, plaintiff had two broken bones in her hand and was disoriented and was taken by ambulance to the hospital.)

Plaintiff did not have a copy of the police report until it was provided by counsel for defendants after the filing of the original complaint. Although an attempt was made to obtain the report prior to filing the original complaint (plaintiff's affidavit, filed herewith), the police department could not locate the report, probably because plaintiff did not know Bryant Ross' name in order to ask for a report involving him.

Even if plaintiff can be said to have known the name of Bryant Ross back in early 1997, and she later forgot it (or was confused or misled, see below), her later lack of knowledge of his name was real and not feigned. A California case considering a similar issue held that the plaintiff's conduct in forgetting the name of the other driver involved in an accident demonstrated carelessness, not willful misuse of the Code of Civil Procedure provision authorizing plaintiff, who was ignorant of the name of the party responsible for causing

damages, to name "Doe" defendants, and thereby comply with the statute of limitations. Balon v. Drost (App. 1 Dist. 1993) 25 Cal.Rptr.2d 12, 20 Cal.App. 4th 483.

Additionally, the only written information plaintiff had in her possession regarding any potential defendant at the time she filed her original complaint was a letter dated August 1997 from an insurance company which listed Christopher Ross as their insured. This was potentially misleading because Bryant Ross is also insured by that company and no mention was made of him.

III

EVEN IF PLAINTIFF CANNOT BE SAID TO HAVE "NOT KNOWN" BRYANT ROSS' NAME WHEN SHE FILED HER ORIGINAL COMPLAINT, THE AMENDED COMPLAINT SHOULD BE CONSIDERED TO RELATE BACK TO THE ORIGINAL COMPLAINT

The relation back doctrine is governed by Utah Rule of Civil Procedure 15(c), which provides that "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading" Utah R. Civ. P. 15(c).

While generally Rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings, the Utah Supreme Court has made an exception to the general rule. The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so it can be assumed or proved that relation back is not prejudicial. Sulzen v. Williams, 977 P.2d 497,

quoting Wilcox v. Geneva Rock Corp., 911 P.2d 367, 369 (Utah 1996). Parties have an identity of interest when “the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage.” Sulzen, 977 P.2d at 501 (quoting Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976)). The rationale underpinning the identity of interest exception is one which obstructs a mechanical use of a statute of limitations; to prevent adjudication of a claim. Id. At 501.

In the present case, Christopher Ross, who was served with the original complaint, is the father of Bryant Ross, who was later served at the same residence where Christopher Ross was originally served. Certainly these parties have an identity of interest when the real party in interest, Bryant Ross, can be reasonably assumed to have been alerted to the proceedings, or was involved in them unofficially from an early stage. In Russell v. Standard Corp., 898 P.2d 263, 265 (Utah 1995) the Court noted that identity of interest exists when existing parties and those sought to be added are so closely related that notice of the action against one serves to provide notice of the action to the other. In this case, given the identity of interest between Christopher and Bryant Ross, and the short period between the filing of the original complaint and the amended complaint, there is very little likelihood that any prejudice could have occurred to defendant Bryant Ross as a result of the amendment. The parties hereto have made their Initial Disclosures and stipulated to a discovery plan.

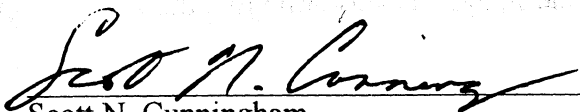
Therefore the amendment should be considered to relate back to the date of the filing of the original complaint which was made prior to the running of the statute of limitations.

CONCLUSION

Plaintiff honestly did not know Bryant Ross' name at the time she filed her original complaint herein. Plaintiff made proper use of the provisions of Rule 9(a)(2) URCP in designating him as a defendant by a fictitious name, and later amended to substitute his true name once it was learned. He was not added as a new party by amendment, but was a party to the action from the filing of the original complaint. Even if plaintiff "knew" Bryant Ross' name years before and later forgot it, her use of Rule 9(a)(2) was still proper, as she in good faith really could not remember his name when she filed her original complaint.

If the Court were to find that plaintiff's use of Rule 9(a)(2) was improper, plaintiff's amended complaint should nevertheless relate back to the date of the filing of the original complaint based upon Rule 15(c)'s relation back doctrine and the "identity of interest" exception. For all of the above reasons, plaintiff respectfully submits that defendant's motion should be denied, and that plaintiff be allowed her day in court with the responsible party for an adjudication of her claim on the merits.

Dated this ____ day of May, 2001.



Scott N. Cunningham
Attorney for Plaintiff Nana Penrose

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of May, 2001, I mailed a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT to:

Michael W. Wright
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106

Scott N. Cunningham

ADDENDUM H

SCOTT N. CUNNINGHAM #6084
Attorney for Plaintiff
211 East 300 South, Suite 216
Salt Lake City, Utah 84111
Telephone 801 364-1663

IN THE THIRD DISTRICT COURT - STATE OF UTAH
SALT LAKE COUNTY - SALT LAKE DEPARTMENT

NANA G. PENROSE,

PLAINTIFF,

-vs-

CHRISTOPHER ROSS, AN INDIVIDUAL, :
BRYANT ROSS, AN INDIVIDUAL (FOR- :
MERLY IDENTIFIED AS DOE 1), DOES :
2-5, INCLUSIVE, WHOSE TRUE NAMES :
ARE NOT KNOWN TO PLAINTIFF, :

DEFENDANTS. :

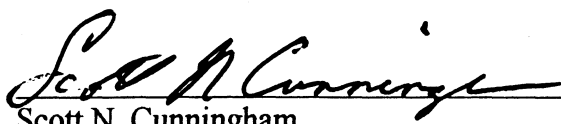
:
: PLAINTIFF'S REQUEST FOR HEARING
ON DEFENDANT BRYANT ROSS'
: MOTION FOR SUMMARY JUDGMENT
:

: Civil No. 000909391

Judge: L.A. DEVER

COMES NOW plaintiff Nana G. Penrose, by and through her attorney, and pursuant to Code of Judicial Administration, Rule 4-501 (3)(b), respectfully requests that the Court set date and time for a hearing on Defendant Bryant Ross' Motion for Summary Judgment.

Dated this 18th day of May, 2001.



Scott N. Cunningham
Attorney for Plaintiff Nana G. Penrose

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of May, 2001, I mailed a true and correct copy of the foregoing REQUEST FOR HEARING ON DEFENDANT BRYANT ROSS' MOTION FOR SUMMARY JUDGMENT to:

Michael W. Wright
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106

Scott P. Cunningham

ADDENDUM I

SCOTT N. CUNNINGHAM #6084
Attorney for Plaintiff
211 East 300 South, Suite 216
Salt Lake City, Utah 84111
Telephone 801 364-1663

FILED
01 JUN -6 PM 4:21
CLERK OF COURT
DEPUTY CLERK

IN THE THIRD DISTRICT COURT - STATE OF UTAH
SALT LAKE COUNTY - SALT LAKE DEPARTMENT

NANA G. PENROSE,	:	
	:	PLAINTIFF'S MEMORANDUM OF
	:	POINTS AND AUTHORITIES IN
PLAINTIFF,	:	RESPONSE TO DEFENDANT BRYANT
	:	ROSS' REPLY MEMORANDUM IN
	:	SUPPORT OF MOTION FOR SUMMARY
	:	JUDGMENT
-vs-	:	
	:	Civil No. 000909391
CHRISTOPHER ROSS, AN INDIVIDUAL, :		
BRYANT ROSS, AN INDIVIDUAL (FOR-	:	Judge: L.A. DEVER
MERLY IDENTIFIED AS DOE 1), DOES :		
2-5, INCLUSIVE, WHOSE TRUE NAMES :		
ARE NOT KNOWN TO PLAINTIFF, :		
DEFENDANTS. :		

Plaintiff Nana Penrose, by and through her counsel, Scott N. Cunningham, hereby submits the following Response to Defendant Bryant Ross' Reply Memorandum in order to correctly inform this Court of blatantly misleading statements regarding Utah case law set forth in Defendant's Reply Memorandum.

ARGUMENT

The Utah cases dealing with the “identity of interest” exception to the rule that normally an amendment to a pleading which adds a new party does not relate back to the date of the original filing have held that the primary focus of the inquiry is on whether the parties have a sufficiently close relationship to one another to justify the conclusion that notice to one serves as notice to the other. The key is notice, and consequently a lack of prejudice. The cases cited by plaintiff in her Memorandum in Opposition to defendant’s motion set this forth accurately and by direct quotes from those cases. Defendant’s only response to that on point case law is to attempt to add further requirements to those holdings which those courts simply did not state: defendant states that “...a closer review of the cases dealing with the unity of interest question shows that the **criteria** for finding such a unity **require** more than just close personal relationship between the first party named and the party whose addition is sought.” Defendant’s Reply Memo at p.8. (Emphasis added) Defendant states that this has been the holdings of those courts because of a recurring fact pattern in those cases that the old and new parties have a common interest in the outcome of the litigation at hand.

First, not only is that not the holding of any of the cases cited by either party hereto, but **there is not even any mention of that issue in those cases.** In Doxey-Layton Co. v. Clark, 548 P2d 902 (Utah 1976), the court set forth the criteria for finding an “identity of interest” at page 906 of its opinion:

“The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial. The rationale underpinning

this is one which obstructs a mechanical use of a statute of limitations; to prevent adjudication of a claim. Such is particularly valid, where, as here, the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially from an early stage.” Id. at 906.

In Wilcox v. Geneva Rock Corp., 911 P.2d 367 (Utah 1996), the Court quoted the above holding in Doxey-Layton, supra, as setting forth the applicable rule for finding that an “identity of interest” exists, and that therefore the exception would apply. Wilcox, at p. 370. Again, the crux of the determination is that the real parties in interest had notice of the proceedings (and thus were not prejudiced). In Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984), the Court stated that : “Identity of interest as used in this context means that the parties are so closely related in their business operations that **notice** of the action against one serves to provide **notice** of the action to the other.” Id. at p. 217. (Emphasis added). In Russell v. Standard Corp. , 898 P.2d 263 (Utah 1995) the Court again held that the requirement for finding identity of interest is that the parties are so closely related that notice of the action against one serves to provide notice to the other. Id. at p. 265. In Sulzen v. Williams , 977 P.2d 497 (Utah App. 1999) the Court of Appeals quoted Wilcox, supra, which in turn had quoted Doxey-Layton, supra, for the rule set forth hereinabove in those cases.

The factor that those courts were looking for in each of those cases was notice to the real party in interest (so that relation back of an amendment was not prejudicial).

Nowhere in any of the above-cited cases, or any case cited by defendant, is it held by any court that a “common interest in the outcome of litigation at hand” is a requisite part of the analysis. In fact, no mention of issue that is even made.

In the present case, **Christopher Ross, who was served with the original**

complaint, is the father of Bryant Ross, who was later served at the same residence where Christopher Ross was originally served. Moreover, Christopher Ross knew that he had not been involved in an accident such as was described in Plaintiff's original Complaint. And, being that Bryant Ross was apparently seventeen years old at the time of the accident and was hospitalized following the accident, and given that Bryant Ross was apparently insured under Christopher Ross' policy (see Exhibit A to plaintiff's Declaration previously filed herein), it is entirely reasonable to assume that Christopher Ross was aware that Bryant Ross had been involved in the accident, and that he informed Bryant Ross of the Summons and Complaint that Christopher Ross had been served with at their home. Therefore, not only did Bryant Ross receive notice of plaintiff's action at that time, but it would have been clear that the action related to the accident that Bryant had been in.

Bryant Ross "can be reasonably assumed to have been alerted to the proceedings, or was involved in them unofficially from an early stage." No prejudice will result to Bryant Ross by the relation back of plaintiff's Amended Complaint to the date of the original Complaint. Nor has Bryant Ross even made the suggestion that he would be prejudiced in any way by a relation back of the Amended Complaint. The time between the filing of the original complaint and the amended complaint was only a little more than one month. Moreover, Christopher Ross and Bryant Ross are insured by the same company, and therefore, the evidence gathered by the insurer for each of the defendants Ross regarding the accident would be the same. Additionally, these defendants both have the same attorneys, which further demonstrates an identity of interest preventing prejudice from resulting.

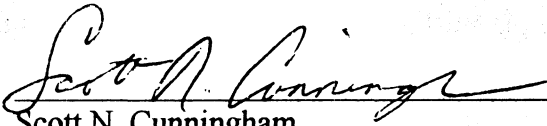
On the other hand, plaintiff stands to lose her day in court for an adjudication upon the merits against the young driver who she alleges hit her, causing her to suffer, as plaintiff has

alleged in her verified pleadings, broken bones, a trip to the hospital, and permanent injury. It should be noted that the parties hereto have made their Initial Disclosures and stipulated to a discovery plan which this Court has incorporated into an Order.

CONCLUSION

For the reasons stated above, plaintiff respectfully submits that this is a case which fits within the "identity of interest" exception, and that a relation back, especially in light of the lack of prejudice to Bryant Ross, should be recognized with the result that plaintiff will not be deprived of her day in court.

Dated this 6th day of June, 2001.

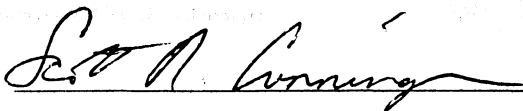


Scott N. Cunningham
Attorney for Plaintiff Nana Penrose

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of June, 2001, I mailed a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT BRYANT ROSS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT to:

Michael W. Wright
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106



ADDENDUM J

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

PENROSE,	:	
Plaintiff,	:	DEFT'S MOTION FOR SUMMARY
	:	JUDGMENT
	:	
vs.	:	Case No: 000909391
	:	
CHRISTOPHER ROSS,	:	Judge: L. A. DEVER
Defendant.	:	Date: 09/6/2001

Clerk: debbiep

On order of Judge Dever, deft Bryant Ross Motion for Summary Judgment is granted. Statue of Limitations has run. The use of "John Doe" designation insufficient to preserve claim for reasons noted in deft's memorandum. No identity of interest established. c/o atty for deft to prepare an order for the court to sign.

Case No: 000909391
Date: Sep 10, 2001

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000909391 by the method and on the date specified.

METHOD NAME

Mail	SCOTT N CUNNINGHAM ATTORNEY PLA 211 East 300 South, #216 SALT LAKE CITY, UT 84111
Mail	MICHAEL W. WRIGHT ATTORNEY DEF 2180 South 1300 E, Suite 600 SALT LAKE CITY UT 84106

Dated this 10 day of Sept, 2001.



Deputy Court Clerk

ADDENDUM K

SCOTT N. CUNNINGHAM #6084
Attorney for Plaintiff
211 East 300 South, Suite 216
Salt Lake City, Utah 84111
Telephone 801 364-1663

FILED
THIRD DISTRICT COURT
01 OCT -1 PM 4:28
SALT LAKE DEPARTMENT
BY _____
CLERK

IN THE THIRD DISTRICT COURT - STATE OF UTAH

SALT LAKE COUNTY - SALT LAKE DEPARTMENT

NANA G. PENROSE,

PLAINTIFF,

-vs-

CHRISTOPHER ROSS, AN INDIVIDUAL, :
BRYANT ROSS, AN INDIVIDUAL (FOR- :
MERLY IDENTIFIED AS DOE 1), DOES :
2-5, INCLUSIVE, WHOSE TRUE NAMES :
ARE NOT KNOWN TO PLAINTIFF, :

DEFENDANTS. :

PLAINTIFF'S OBJECTION TO
PROPOSED ORDER GRANTING
DEFENDANT BRYANT ROSS'
MOTION FOR SUMMARY JUDGMENT

Civil No. 000909391

Judge: L.A. DEVER

Plaintiff, Nana Penrose, by and through her counsel, Scott N. Cunningham, hereby objects to the Proposed "Order Granting Defendant Bryant Ross' Motion for Summary Judgment and Findings of Fact and Conclusions of Law" as prepared by counsel for Defendant in the above-captioned case on the following basis: The Court's ruling per the Minute Entry dated September 6, 2001, dealt with two issues: on the first issue, the Court's ruling was that the use of the John Doe designation was insufficient to preserve the claim against Bryant Ross. **But plaintiff had also argued that** because she had amended her Complaint to include Bryant Ross, the amendment adding a him as a defendant should relate back to the date of the

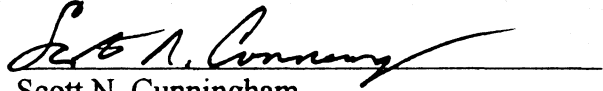
filing of the initial Complaint under the “identity of interest” exception to the rule that normally an amendment adding a new party does not relate back in time. On plaintiff’s argument for a relation back based upon the exception, the Court specifically ruled that no identity of interest had been established.

Because the Court ruled on the application of the “identity of interest” exception, and in fairness to plaintiff, the Order should state in the Findings of Fact and Conclusions of Law that:

“The plaintiff’s Amended Complaint does not relate back in time to the date of the filing of plaintiff’s initial Complaint because the amendment added a new party to the action, and the “identity of interest” exception does not apply because no identity of interest was established.”

Further, the proposed order as drawn states in the Findings of Fact and Conclusions of Law at paragraph 3. that: “On January 2, 2001, plaintiff filed her First Amended Complaint attempting to substitute the name of Bryant Ross for one of the Doe defendants.” Plaintiff objects to the language “attempting to substitute” because plaintiff did, in fact, amend her initial Complaint to include the name Bryant Ross as a defendant in her First Amended Complaint, and did not merely “attempt” to do so. Paragraph 3. should state that plaintiff amended her Complaint to name Bryant Ross as a defendant instead of one of the Doe defendants. For the same reason, Plaintiff objects to the language “attempted substitution” in paragraph 6. of the proposed order. Paragraph 6. should state that “The amendment of plaintiff’s Complaint substituting Bryant Ross for one of the Doe defendants does not relate back in time to the original filing of the Complaint. The ‘identity of interest’ exception does not apply because no identity of interest was established.”

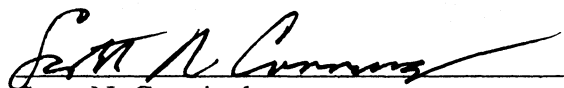
Dated this 1st day of October, 2001.


Scott N. Cunningham
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on October 1, 2001, I mailed a true and correct copy of the foregoing Objection to Proposed Order to the following:

Michael W. Wright
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106


Scott N. Cunningham

1.75 miles per hour (1.75 mph)

1.75 miles per hour (1.75 mph)

1.75 miles per hour (1.75 mph)

1.75 miles per hour (1.75 mph)

ADDENDUM L

1.75 miles per hour (1.75 mph)

1.75 miles per hour (1.75 mph)

1.75 miles per hour (1.75 mph)

1.75 miles per hour (1.75 mph)

1.75 miles per hour (1.75 mph)

RICHARD K. GLAUSER (4324)
MICHAEL W. WRIGHT (6153)
SMITH & GLAUSER, P.C.
A Professional Corporation
Parkview Plaza
2180 South 1300 East, Suite 600
Salt Lake City, UT 84106
Telephone: (801) 466-4228
Facsimile: (801) 466-6291
Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

NANA PENROSE,

Plaintiff,

v.

CHRISTOPHER ROSS, an individual,
BRYANT ROSS, an individual, and Does
2-5, inclusive, whose true names are not
known to Plaintiff.

Defendants.

**ORDER GRANTING DEFENDANT,
BRYANT ROSS', MOTION FOR
SUMMARY JUDGMENT**

Civil No.: 000909391

Judge L.A. Dever

The defendant, Bryant Ross', Motion for Summary Judgment came before the Court on its pleadings. The Court having considered the Motion and Memoranda in support thereof, as well as, the Memorandum in Opposition to the Motion for Summary Judgment and supplemental Memorandum in Opposition to Motion for Summary Judgment, and the Court being well informed in the premises,

IT IS HEREBY ORDERED, ADJUDGED and DECREED, that,

Defendant, Bryant Ross', Motion for Summary Judgment should be granted.

This judgment is made on the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The accident underlying the Complaint occurred on November 21, 1996 in Salt Lake City, Utah.
2. Plaintiff filed an initial Complaint which named Christopher Ross and John Does 1-5 as defendants to the action on November 17, 2000.
3. On January 2, 2001, plaintiff filed her First Amended Complaint attempting to substitute the name of Bryant Ross for one of the Doe defendants.
4. As this is an action for personal injury, it must be brought within four years of the date of the accident.
5. Plaintiff failed to name defendant Bryant Ross within the four year period.
6. The attempted substitution of Bryant Ross for one of the Doe defendant's does not relate back in time to the original filing of the Complaint.
7. Dismissal with prejudice of all cause of actions is the proper remedy for failure to bring a timely claim.

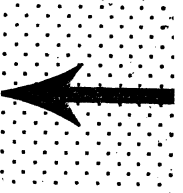
DATED this 30 day of September, 2001.

BY THE COURT:


HONORABLE L.A. DEVER

By


STAMP USED AT DIRECTION OF JUDGE



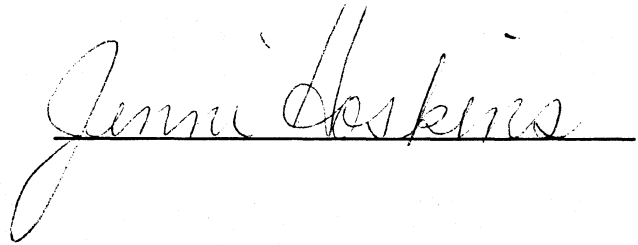
CERTIFICATE OF SERVICE AND NOTICE

NOTICE:

Pursuant to Rule 4-504 of the *Utah Code of Judicial Administration*, you are hereby notified that defendant's counsel has forwarded the original hereof to the Court for signature, and you have five (5) days from the date this notice is served upon you to file any written objections to the form of the foregoing Order with the Court and mail a copy to defendant's counsel. If no objections are filed within that time, the original hereof will be signed and filed.

I hereby certify that a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT, BRYANT ROSS', MOTION FOR SUMMARY JUDGMENT** was mailed, postage pre-paid, this 25 day of September, 2001, to:

Scott N. Cunningham
211 East 300 South, Suite 216
Salt Lake City, UT 84111

A handwritten signature in cursive script, reading "Jenni Hopkins", is written over a horizontal line.

DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

1997-1998

THE DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

WANTS TO HEAR FROM YOU

IF YOU ARE INTERESTED IN

APPLYING FOR A POSITION

PLEASE CONTACT US

ON THE FOLLOWING

TELEPHONE NUMBERS

ADDENDUM M

FOR THE YEAR 1997-1998

OF THE DEPARTMENT

OF AGRICULTURE

AND RURAL DEVELOPMENT

FOR THE YEAR 1997-1998

1997-1998

and or counter-party or his zed practice of

f raising claim ounterclaim in se occurred —

gainst whom a Federal Civil L.R. Fed. 815. r Rule 13(a) or Procedure with Rule 12(b) as t. Fed. 388.

federal action y counterclaim L.R. Fed. 240.

r commence-ay cause a to the action against him. ce if he files his original all parties to y complaint, enses to the ounterclaims r third-party ; may assert ff has to the claim against s the subject The plaintiff g out of the intiff's claim nt thereupon erclaims and may proceed is or may be against the

im is asserted ght in under to do so.

Appellate jurisdiction.
Third party by defendant.
— Grounds.
Untimely motion to allow counterclaim.
Cited.

Appellate jurisdiction.

The final judgment rule, R.Civ.P. 54(b), applies when the trial court orders a separate trial of the claim, cross-claim, counterclaim, or third-party claim, and failure to have the case certified as final by the trial court, leaving issues and parties before that court, will deprive the appellate court of jurisdiction over an appeal. *First Sec. Bank v. Conlin*, 817 P.2d 298 (Utah 1991).

Third party by defendant.

— Grounds.

If one named as a defendant tort-feasor impleads another alleged joint tort-feasor, the defendant in the initial action does so, not on

the ground that a claim for relief then exists against the third-party defendant, but on the ground that the third-party defendant "may be liable" to the defendant in the principal action. *Unigard Ins. Co. v. City of LaVerkin*, 689 P.2d 1344 (Utah 1984).

Untimely motion to allow counterclaim.

The trial court did not abuse its discretion in denying motions to allow a counterclaim and to bring in third party defendants which were filed 13 months after an answer to the complaint was filed and two weeks before the scheduled trial date, where reasons for the untimely motion were inadequate and where the parties failed to demonstrate that the court's denial of the motions resulted in prejudice. *Tripp v. Vaughn*, 746 P.2d 794 (Utah Ct. App. 1987).

Cited in *Serr v. Rick Jensen Constr., Inc.*, 743 P.2d 1202 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties § 188 et seq.
C.J.S. — 67 C.J.S. Parties §§ 72 to 84.

A.L.R. — Defendant's right to contribution or indemnity from original tortfeasor, 20 A.L.R.4th 338.

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.